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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 10

ALDEN WHITMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The oral opinion of the district court (J.A. 54–55) is not reported. The opinion of the court of appeals (R. 1–3) is reported at 281 F. 2d 59.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1960 (R. 4). The petition for a writ of certiorari was filed on August 5, 1960, and granted on June 19, 1961 (R. 4; 366 U.S. 959). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the hearings of the Senate Internal Security Subcommittee at which petitioner appeared were properly authorized.

2. Whether the Subcommittee's investigation into Communist activities in the news media field violated petitioner's rights under the First Amendment.

3. Whether petitioner raised the issue of pertinency at the time he refused to answer the questions and, if not, whether he can claim that he was not apprised of their pertinency for the first time at his trial.

4. Whether the questions petitioner refused to answer were pertinent to the subject under inquiry.

5. Whether petitioner can raise the issue whether the Subcommittee apprised him of the source of its authority for the first time at his trial and, if he can, whether the Subcommittee was required to apprise petitioner of the source of its authority.

6. Whether the indictment was invalid because it failed to specify the subject under inquiry and the pertinency of the questions to that subject, and did not state the delegation of authority from the parent committee to the Subcommittee.

STATUTE, RESOLUTION, AND RULE INVOLVED

Section 192 of Title 2 U.S.C., Senate Resolution 366, 81st Cong., 2d Sess., and Rule 7(c) of the Federal Rules of Criminal Procedure are set forth in the appendix to petitioner's brief at pp. 3–5.

STATEMENT

Petitioner was charged in a nineteen-count indictment (J.A. 4–6), returned in the District Court for the District of Columbia, with having refused, in violation of 2 U.S.C. 192, to answer nineteen questions asked him by the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Com-

mittee on the Judiciary. Petitioner was found guilty by the court on all the counts (J.A. 54–55) and was sentenced to serve six months' imprisonment, which was suspended, and to pay a fine of $500 (J.A. 62–63). The judgment of the trial court was affirmed by the court of appeals (Pet. App. 1a–3a).

The pertinent facts may be summarized as follows:

On June 28 and 29, 1955, the Internal Security Subcommittee heard the testimony of Winston Burdett, a newspaperman and broadcaster, in connection with its continuing investigation since 1950 into Communist subversion and the operation of the internal security laws (Tr. 173–174); Hearings on *Strategy and Tactics of World Communism,* Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, U.S. Senate (hereinafter designated "Hearings"), 84th Cong., 1st Sess., Part 14, pp. 1324–1363). Burdett, who said that he had been a member of the Communist Party from 1937 until the early 1940's, testified concerning attempts by the Communist Party to influence public opinion by infiltration of Party members into the newspaper field. He stated that he became a member of the Party's unit in the Brooklyn Eagle in 1937 while employed by that newspaper (Hearings, Part 14, p. 1324); that the unit included several reporters and editorial writers (*id.* at pp. 1325–1327, 1359–1360); that Party leaders induced him to become a foreign correspondent for the Eagle in order to use his position to act as an espionage agent for the Soviet Union and that he continued these activities while subsequently employed by Transradio

Press and the Columbia Broadcasting System during World War II (*id.* at pp. 1328–1341, 1347–1353); and that employees of other New York newspapers had been Party members around 1940 (*id.* at pp. 1360–1363).

The counsel of the Subcommittee testified at petitioner's trial concerning the reason petitioner was subpoenaed to testify. At the time petitioner was subpoenaed, the Subcommittee had information that petitioner had been active in the Communist Party in Connecticut in the mid-thirties; that he had been an official of the American Committee for the Protection of the Foreign Born, which organization had been cited by the Attorney General as a Communist-front organization; that he had been an executive secretary of the New York Committee for the Protection of the Foreign Born, which had also been cited by the Attorney General as a Communist-front; that he had been connected with a magazine called "Science and Society," which was part of a scheme to recruit teachers from American universities and colleges into the Communist Party; and that he had been employed by TASS, the Soviet news agency, which the Subcommittee believed to be a cover for Soviet espionage[1] (J.A. 10–12).

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[1] On February 8, 1956, the Subcommittee heard testimony from Yuri Rastvorov, who was until 1954 a Lieutenant Colonel in the Soviet Secret Police and Intelligence Service, that 85 or 90 percent of persons employed outside the Soviet Union by TASS belonged to the Soviet Intelligence Service. Hearings on *Scope of Soviet Activity in the United States*, Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Senate

The Subcommittee held public hearings in Washington, D.C., on January 4, 5, and 6, 1956.[1] At the opening of the hearings on January 4, Senator Eastland, the Chairman of the Subcommittee, announced that the hearings about to commence "stem from sessions of this subcommittee held on June 28 and 29, 1955, in which we heard the testimony of Mr. Winston Mansfield Burdett, a newspaperman and broadcaster" (Gov. Ex. 8, p. 1587).[2] Burdett had, the Chairman continued, disclosed the names of persons whom he knew as members of the Communist Party in the early 1940's. The Chairman concluded that the investigation was of great importance because (*ibid.*):

> [A]mong the persons involved in this investigation have been many who were or are members of the press, and * * * the international Communist conspiracy has as one of its primary aims the influencing of public opinion, thus carrying on its psychological warfare against the United States and its institutions from inside by methods of penetration. * * * The present hearings open up a subsequent chapter to the Burdett testimony * * *.

Following the opening statement, another member of the Subcommittee, Senator Hennings, apparently apprehensive that the public might misconstrue the

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Committee on the Judiciary, 85th Cong., 2d sess., pt. 1, pp. 2, 18–19.

[1] Robert Shelton, the petitioner in No. 9, this Term, and William Price, the petitioner in No. 12, this Term, also refused to answer certain questions at this same hearing and were subsequently convicted for contempt.

[2] Government Exhibit 8 is Part 17 of the Hearings, entitled *Strategy and Tactics of World Communism* (*Communist Activity in New York*).

purpose of the hearings, further explained (Gov. Ex. 8, p. 1588):

> [T]his is not in any sense an attack upon the free press of the United States. * * *
>
> Of course, the committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency. * * * [T]his is not an attack upon any one newspaper, upon any group of newspapers as such, but an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press.

In response, the Chairman approved Senator Hennings' description of the purpose of the hearings as a "very fine and very accurate statement, one with which the Chair certainly agrees, in its entirety" (*ibid.*). The Chairman went on to say (*ibid.*):

> We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it, and I think that when this series of hearings is over that no one can say that any newspaper or any employees of any one newspaper has been singled out.

At petitioner's trial, the counsel for the Subcommittee testified concerning the purpose of the investigation (J.A. 31):

> The purpose of these inquiries was to further the committee's design to learn all it could about the operations of the Communist Party in as many fields as it could go into for

> the purpose of determining what if any legislation would be recommended which would help to preserve and protect the Internal Security and safety and defense of the United States. In these particular hearings we were in an area within the broad area of tactics and strategy, within the narrower area of infiltration of mass communications.

Later, the counsel for the Subcommittee testified that the subject of the investigation was "into mass communications infiltration by Communists" (J.A. 34).

Eighteen witnesses were called by the Subcommittee to testify at the hearings on January 4, 5, and 6, 1956. All had been or were then employed in the communications field. Clayton Knowles, who had previously given the Subcommittee information on Communist activity in newspapers (Gov. Ex. 8, p. 1717), was among the witnesses called to testifiy on January 4. Knowles testified that he was then a reporter for the New York Times; that he was a member from 1937 to 1939 of the Communist Party unit on the Long Island Daily Press where he was a reporter; and that Party members at that time had positions of importance and exerted considerable influence in the American Newspaper Guild (*id.* at pp. 1635–1642).

On January 6, 1956 (two days later), the same day that petitioner testified, the hearings opened with the reading of a telegram sent to the Subcommittee by a New York newspaper, the Long Island Daily Press, in which that newspaper agreed with the Subcommittee's efforts to expose Communist infiltration wherever found (Gov. Ex. 8, p. 1717). The Chairman, in responding to the telegram, repeated that the hearings were directed to investigating Communist infiltration

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into news agencies (*id.* at pp. 1717–1718). Senator Hennings stated (*id.* at p. 1718):

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations of efforts of the Communist Party to infiltrate newspapers or other media of communication.

The Subcommittee then called Robert Shelton, the petitioner in No. 9, this Term, to testify. Immediately after Shelton testified, petitioner was called to testify. Petitioner, a copyreader for the New York Times (Gov. Ex. 8, pp. 1728, 1729), testified that he was a member of the Communist Party from 1935 to approximately 1949, and that he had belonged to Party cells in Bridgeport, Connecticut, where he joined the Party, Buffalo, New York, and New York City (*id.* at pp. 1730–1733, 1739, 1744–1745). When he was asked to name the members of a cell to which he belonged in New York City, however, he declined to answer on the grounds that his private affairs, beliefs, and associations were not proper subjects for investigation; that their pertinence to any valid legislative purpose was in doubt; and that it was doubtful whether Congress had the right to investigate the press (*id.* at pp. 1733, 1735). He disclaimed any reliance on the Fifth Amendment, relying instead on the First Amendment and the doctrine of separation of powers (*id.* at pp. 1733–1735). He subsequently suggested that he would not answer questions which "might cause other individuals unnecessary harm or embarrassment" (*id.* at p. 1737; see also *id.* at pp. 1741, 1742). Petitioner was told by the Chairman that the question was asked because the Subcommittee was investigating

a Communist cell which it had reason to believe was active in New York City and that the Subcommittee wanted to know petitioner's associates in that cell (Gov. Ex. 8, pp. 1737, 1738). Petitioner was then directed to answer the question (*id.* at p. 1739). He again refused (*ibid.*), and this refusal constitutes the basis for count 1 of the indictment (J.A. 4).

On the basis of his original objections to the inquiry, petitioner declined to answer the questions upon which the remaining counts in the indictment are predicated (J.A. 4–6).[4] He refused to state whether the cell to which he belonged in New York City was located at one of the major newspapers, on what newspaper he worked at the time he was a member of the cell, and whether during all or part of the period from January 1943 to June 30, 1951, he was a member of a Communist cell composed of employees of the New York Herald Tribune where he was then employed (counts 3–5) (Gov. Ex. 8, pp. 1740–1741). The Subcommittee counsel then read petitioner a transcript of petitioner's appearance before the Subcommittee in executive session. The transcript showed that petitioner was asked, "while you were with the New York Herald Tribune, were you connected with a Communist unit in the New York Herald Tribune?" (*id.* at p. 1742). After first refusing to answer, petitioner finally gave "[a] very reluctant 'yes'" (*ibid.*). At the public session, petitioner was asked whether this testimony was true, and he said that it was (*id.* at p. 1743). The Subcommittee then asked who were the

[4] The only question to which he gave different grounds for refusal to answer underlies count 8 (see *infra*, p. 12).

members of the cell at the Herald Tribune, and whether any of the members of the cell were currently employed by the Tribune (counts 6 and 7) (Gov. Ex. 8, pp. 1743–1744). Petitioner declined to answer.

Petitioner testified that his first employment in New York in 1938 was with the National Committee for People's Rights (Gov. Ex. 8, pp. 1732, 1743). He was advised by the Subcommittee that in 1942 this organization had been cited by the Attorney General "as a Communist organization, substantially equivalent to the International Labor Defense, legal arm of the Communist Party" (*id.* at p. 1743). After working for this organization for two or three months, he did research on a book, but he refused to give the name of the book or to state for whom he did the research (count 9) (*id.* at pp. 1745–1746). He also refused to state whether the book was published by a Communist publishing house or whether the person for whom he worked was known to him to be a Communist (counts 10 and 11) (*id.* at p. 1746).

Petitioner testified that for a period of eight weeks he was employed by the North American Committee to Aid the Spanish Democracy (Gov. Ex. 8, pp. 1746–1748), but he refused to state whether there were any persons in that organization known by him to be Communists (count 12) (*id.* at p. 1747). He was then advised by the Subcommittee that in 1949 the North American Committee had been cited by the Attorney General as a Communist organization and by the House Committee on Un-American Activities as a Communist front (*ibid.*). He was further informed that it had received funds from the Communist Party of Massachusetts and from the International Workers Order and

that its literature had been sold in Communist bookstores (*ibid.*). Petitioner persisted in his refusal to answer and further declined to name the person who paid him for working for that organization (count 13) (*id.* at p. 1748).

Petitioner testified that he also worked for about two months as a press agent for Films for Democracy (Gov. Ex. 8, pp. 1748–49). He was told by counsel for the Subcommittee that, in March 1944, Films for Democracy had been cited as a Communist-front organization; that the Cinema Bureau in Moscow had laid down directives in 1939 "concerning the building up of audiences for the purpose of agitating against certain films opposed to the current Communist Party line and supporting those which favored the line"; and that, pursuant to that directive, Film Audiences, a Communist front, merged with Films for Democracy to form a new Communist front, Film Audiences for Democracy (*id.* at p. 1749). Petitioner declined to state whether there were any persons connected with Films for Democracy known to him to be Communists or to disclose who paid him for his work (counts 14 and 15) (*id.* at pp. 1748–49).

After he left Films for Democracy, petitioner worked for several months for Veterans of Democracy as a press agent and researcher for one of its officers who was speaking once a week over radio station WQXR (Gov. Ex. 8, pp. 1749–1750). He refused to answer whether any persons connected with that organization were known to him to be Communists or to name the officer for whom he worked (counts 16 and 17) (*id.* at p. 1750).

Petitioner testified that he had worked successively from the fall of 1939 to December 1941 for the Rus-

sian news agency, TASS, for the New York Peace Committee, and for the American Committee for the Protection of the Foreign Born (Gov. Ex. 8, pp. 1751–1752). He was told by the Subcommittee that the American Committee for the Protection of the Foreign Born had been cited by the Attorney General as a subversive and Communist-front organization and that it was known as "one of the oldest auxiliaries of the Communist Party in the United States" (*id.* at pp. 1729, 1752). He declined to state whether any persons in the New York Peace Committee or the American Committee for the Protection of the Foreign Born were known to him to be Communists (counts 18 and 19) (*id.* at p. 1752).

From December 1941 to January 1943, petitioner worked for the Buffalo Evening News (Gov. Ex. 8, pp. 1728, 1753). He testified that he joined a Communist unit in Buffalo, but he refused to state who were the members of that unit (count 2) (*id.* at pp. 1739, 1753). In January 1943, he returned to New York where he became a copy reader for the New York Herald Tribune (*id.* at p. 1753). He remained with the Tribune until the end of June 1951, when he began his present employment with the New York Times (*id.* at p. 1754).

Petitioner testified that he left the Communist Party in 1948 (Gov. Ex. 8, pp. 1730–1731, 1745). He could not recall writing a formal resignation but at about that time he stopped going to meetings and paying dues (*id.* at p. 1745). "[O]n the basis of privileged communication between me and my wife," he declined to state whether he told anyone that he was quitting the Party (count 8) (*ibid.*).

SUMMARY OF ARGUMENT

I

The hearings at which petitioner appeared were properly authorized. As we have shown in our brief in *Liveright* v. *United States*, No. 11, this Term, pp. 19–28, the Senate authorized the Judiciary Committee or one of its subcommittees to investigate Communist activities. S. Res. 366, 81st Cong., 2d Sess.; S. Res. 58, 84th Cong., 1st Sess. The record at the trial clearly showed that the Judiciary Committee in 1955 authorized the continuance of the Internal Security Subcommittee, established under Senate Resolution 366, during the 84th Congress. Moreover, petitioner cannot claim that the Judiciary Committee had not delegated its authority to the Subcommittee since he did not raise this issue when he appeared before the Subcommittee (see our briefs in *Shelton* v. *United States*, No. 9, this Term, pp. 25–29, and *Liveright*, pp. 29–32) nor in his petition for a writ of certiorari in this Court.

Similarly, petitioner cannot contend that the Subcommittee failed to authorize, as required by its own rules, the particular hearings at which petitioner appeared because he did not raise this issue before the Subcommittee or at trial. If the issue had been raised at the trial, the government could have presented evidence directly on this issue. See *Giordenello* v. *United States*, 357 U.S. 480, 487–488. In any event, since a majority of the Subcommittee's members were present at the start of the hearings, and none objected, they implicitly approved the investigation. And, even

if they had not done so, the Subcommittee counsel testified at petitioner's trial that the Subcommittee did not consider the hearings as the start of a major investigation and therefore under the Subcommittee's rules no new approval was required.

II

For the same reasons stated in our brief in *Shelton* v. *United States, supra*, pp. 48–50, which involved the same investigation and hearings, the Subcommittee's investigation did not violate the First Amendment. See *Barenblatt* v. *United States*, 360 U.S. 109, 125–134.

Petitioner attempts to distinguish *Barenblatt* on the ground that the questions he refused to answer sought the identity of other persons. In fact, however, only seven of the questions were of this type. In any event, this contention is without merit.

A. Petitioner has no standing to claim the First Amendment rights of other persons. He admitted that he was a member of the Communist Party. The questions which he refused to answer involved the identity of others.

This Court has held in numerous cases that a litigant cannot invoke the constitutional rights of others. The only exception is when the litigant can be said to represent the persons whose constitutional rights were allegedly violated. Thus, an association can invoke the rights of its members. See *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449. In contrast, here petitioner's only connection with the unnamed other persons is at most friendship and common membership, in the past, in the Communist Party.

B. Even if petitioner had standing to raise this issue, the First Amendment is not violated by questions asking the identity of other persons. In *Barenblatt*, the Court held that "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and * * * therefore the provisions of the First Amendment have not been offended" (360 U.S. at 134). The governmental interest in questions disclosing the identity of other persons involved in Communist activities is at least as strong as its interest in the questions involved in *Barenblatt* concerning the Communist activities of the witness himself. Moreover, a witness' individual interest in asserting the First Amendment rights of others, if he has standing to assert these rights at all, is substantially less than the interest the witness has in claiming his own rights. At the most, petitioner, in claiming the rights of others, stood in the same position as if those persons were claiming their rights for themselves—that is, the same position as Barenblatt was in.

In addition, the issue as to three of the counts, involving questions seeking the identity of persons in the Communist Party cell, is substantially controlled by *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1. There the Court upheld the constitutionality of an order requiring the registration of all Party members. *A fortiori*, then, a Congressional committee, seeking information in order to legislate, can require a witness to disclose the names of members of Party units to which he belonged.

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III

Petitioner cannot excuse his refusal to answer by the alleged lack of pertinency of the questions.

A. Petitioner made no objection before the Subcommittee to the pertinency of the questions. While he did claim that the questions could not be pertinent to any valid legislative purpose because of the prohibitions of the First Amendment, this is not a claim that the questions were not pertinent to the subject actually under inquiry. Therefore, as we have shown in our brief in *Shelton, supra,* pp. 25–29, petitioner cannot claim that the Subcommittee failed to apprise him of the subject under inquiry or the pertinency of the questions to that subject.

Moreover, petitioner was clearly apprised by the Subcommittee of the subject under inquiry: Communist activities in news media. The pertinency to this subject of seven of the questions which petitioner refused to answer and on which he was convicted was made clear either by the questions on their face or by the explanation of the Subcommittee.

B. The government proved, as 2 U.S.C. 192 requires, that the questions petitioner refused to answer were pertinent to the subjects under inquiry. By introducing the transcript of the hearings, the government established the subject under inquiry described above. As we have noted, the pertinency of seven of the questions was made clear to petitioner by the Subcommittee. The government showed, through oral testimony, that the other two questions were also pertinent.

Petitioner contends that the Subcommittee counsel testified and the Assistant United States Attorney stated at the trial that the subject under inquiry was Communist activities generally. This subject, however, is perfectly consistent with the subject of Communist activities in news media; the latter is merely a portion of the broader subject. Moreover, if the subject was Communist activities generally, this is a proper subject within the authority of the Subcommittee (see our brief in *Liveright, supra,* pp. 42–44). All the questions were pertinent, either on their face or as shown by the government's evidence at the trial, to this subject.

IV

Petitioner contends that the Subcommittee failed to apprise him of the source of its authority from the Senate. Petitioner, however, did not even suggest this objection when he appeared before the Subcommittee when the Subcommittee could readily have met the objection. Therefore, he cannot raise it at his trial for contempt. In any event, there is no need for a Congressional committee to apprise a witness of the source of its authority since the authority of the committee, unlike the subject under inquiry, is contained in the authorizing resolutions which are public documents.

V

Petitioner contends that the indictment was required to specify the subject under inquiry and the pertinency of the questions to those subjects, and to state the delegation of authority from the parent Committee to the Subcommittee. As shown in our brief in *Shelton, supra,* pp. 78–83, under Rule 7(c) of

the Federal Rules of Criminal Procedure and the decisions of this Court and the courts of appeals, an indictment need not specify the subject under inquiry. For the same reasons, it need not provide the reasoning underlying the allegation that the questions were pertinent. We show in our brief in *Price* v. *United States*, No. 12, this Term, p. 34, that the indictment properly alleged the authority of the Subcommittee.

ARGUMENT

Petitioner was convicted of refusing to answer nineteen questions asked him by a Congressional committee. Four of these questions directly involved his own activities in the Communist Party—whether the Party cell to which he belonged was in one of the major newspapers in New York City (count 3); what was the name of the newspaper (count 4); whether he was a member of a Party cell on the New York Herald Tribune (count 5); and whether the book he researched was published by a Communist publishing house (count 10). We agree, however, with petitioner (Pet. Br. 39) that petitioner answered the questions involved in counts 3, 4, and 5 (Gov. Ex. 8, pp. 1742–1743) and therefore his conviction on these counts was improper.[4] Eight questions concerned the

[4] Petitioner first refused to answer, even after being directed to do so. Subsequently, however, he was confronted with the transcript of his appearance before the Subcommittee in executive session where he answered these questions and he then admitted that this answer was true (see *supra*, pp. 9–10). Petitioner did not claim that he had answered these three questions in the district court, the court of appeals, or in his petition for a writ of certiorari. Apparently, this fact was overlooked by him, the government, the Subcommittee, the Senate, and the courts below.

Party activities of other persons, but did not ask the disclosure of their names—whether the members of the Party cell on the Herald Tribune were still employed by that newspaper (count 7); whether he told anyone when he quit the Party (count 8); whether the person for whom he had done the research work was a Communist (count 11); and whether there were any Communists in the North American Committee to Aid the Spanish Democracy (count 12), Films for Democracy (count 14), Veterans for Democracy (count 16), the New York Peace Committee (count 18), and the American Committee for the Protection of the Foreign Born (count 19). Only seven questions required the disclosure of the identity of other persons—who were the members in the Party cell in New York City to which petitioner admitted he belonged (count 1); who were the members of a Party cell in Buffalo to which petitioner admitted he had belonged (count 2); who were the members of the Party cell in the Herald Tribune,*

* In our Brief in Opposition, p. 15, note 9, we suggested that this question may, in view of petitioner's testimony, duplicate the question involved in count 1. This suggestion, however, seems erroneous. Petitioner testified that he was in a Party cell in Bridgeport, Connecticut, from 1935 to 1937, and that he then came to New York City where he joined a Party cell (Gov. Ex. 8, p. 1732). After being asked what unit he first belonged to in New York, he was asked the question involved in count 1—who were the members of that cell (*id.* at pp. 1733, 1737). Petitioner subsequently testified that he left New York City and joined a Party cell in Buffalo and that he had belonged to more than one cell in New York City (*id.* at p. 1739). Petitioner admitted that he had been a member of a Party cell on the Herald Tribune while working there and that he worked for the Tribune from 1943 to 1951 (*id.* at pp. 1741–1743). He then refused to

to which petitioner admitted he belonged (count 6); what was the name of the book which petitioner researched and who was the person for whom he had done the work (count 9); who had paid petitioner when he worked for the North American Committee to Aid Spanish Democracy (count 13); who paid him when he worked for Films for Democracy (count 15); and who was the officer of Veterans for Democracy who spoke over WQXR (count 17). Petitioner was given a general sentence and a fine on all nineteen counts (J.A. 62–63), which was less than the maximum authorized by 2 U.S.C. 192 under any one count; therefore the judgment below must be affirmed if any one of the counts is valid. *E.g., Barenblatt* v. *United States,* 360 U.S. 109, 115.

I

THE HEARINGS AT WHICH PETITIONER APPEARED WERE PROPERLY AUTHORIZED

Petitioner contends (Pet. Br. 46–50) that the hearings at which he appeared were not properly authorized because (1) Senate Resolution 366, 81st Congress, which is the authorizing resolution of the Subcommittee, is ambiguous; (2) the resolution authorizes "the Committee on the Judiciary, or any duly authorized subcommittee thereof" to investigate Communist activities and the record does not show that

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disclose the members of that cell (count 6) (*id.* at p. 1743). Thus, it appears that petitioner's answer to the question involved in count 1 would have disclosed the members of the cell to which he belonged when he first arrived in New York City in 1938, while his answer to the question involved in count 6 would have disclosed the members of the cell on the Herald Tribune to which he belonged after 1943.

the Judiciary Committee had so authorized its Internal Security Subcommittee; and (3) a majority of the Subcommittee never approved these particular hearings, as required by the Subcommittee's rules. We submit that these contentions are without merit.

A. THE RESOLUTIONS ESTABLISHING AND CONTINUING THE SENATE SUBCOMMITTEE ON INTERNAL SECURITY AUTHORIZED A SUBCOMMITTEE OF THE JUDICIARY COMMITTEE TO INVESTIGATE COMMUNIST ACTIVITIES IN THE UNITED STATES

We have shown in our brief in *Liveright* v. *United States*, No. 11, this Term, pp. 19–28, that the Senate authorized the Judiciary Committee or one of its subcommittees to investigate Communist activities. S. Res. 366, 81st Cong., 2d Sess.; S. Res. 58, 84th Cong., 1st Sess. Therefore, the Judiciary Committee was authorized to establish a subcommittee which could question petitioner concerning the subject under inquiry when he testified—*i.e.*, Communist infiltration of news media (see *infra*, pp. 40–41, 43–46).

B. THE JUDICIARY COMMITTEE AUTHORIZED THE INTERNAL SECURITY SUBCOMMITTEE

Petitioner cannot claim that the Subcommittee was not authorized by the Judiciary Committee since he failed to raise this contention before the Subcommittee. As explained in our briefs in *Shelton* v. *United States*, No. 9, this Term, pp. 25–29 and *Liveright*, pp. 29–32, a witness before a Congressional committee cannot raise at his trial procedural issues on which he did not rely at the time he refused to answer the questions. See *United States* v. *Bryan*, 339 U.S. 323, 330–335; *Emspak* v. *United States*, 203 F. 2d 26, 54, 56 (C.A. D.C.), reversed on other grounds, 349 U.S. 190. The issue whether the Judiciary Committee properly dele-

gated the powers conferred on it by the Senate involves the internal procedures of the Judiciary Committee. Just like the defects said to be involved in *Liveright* v. *United States, supra*—whether the Subcommittee could sit while the Senate was in session and whether the Judiciary Committee had authorized an executive session—the defect alleged here could easily have been remedied (assuming petitioner's contention were correct that the Judiciary Committee had not already authorized the Subcommittee) by having the Judiciary Committee vote an authorizing resolution.

Petitioner is also precluded from raising this issue because it was not presented in his petition for a writ of certiorari. Therefore, under Rule 40(1)(d)(2) of the Rules of this Court, he cannot raise it in his brief on the merits unless there was "plain error." *E.g.*, *Kessler* v. *Strecker*, 307 U.S. 22, 34.

In any event, petitioner's contention is clearly without substance. Government Exhibit 3, an excerpt from the official minutes of a meeting of the Judiciary Committee on January 20, 1955, states that the Committee adopted the following resolution:

> Resolved, by the Committee on the Judiciary, that the Special Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws under S. Res. 366 (81st Cong.) be continued as a Special Subcommittee of the Committe on the Judiciary during the 84th Congress and that the Committee report an appropriate original resolution favorably to the Senate for this purpose.

The minutes of another meeting of the Judiciary Committee on February 7, 1955, show that the Chairman

appointed nine members of that Committee to the Subcommittee (Gov. Ex. 4). And on March 18, 1955, the Senate passed Senate Resolution 58, 84th Cong., 1st Sess., authorizing the continuance of the Subcommittee. While the resolution of the Judiciary Committee to continue the Subcommittee preceded the Senate's authorizing resolution, it is plain that the Judiciary Committee authorized the Subcommittee to act during the 84th Congress.

C. THE INTERNAL SECURITY SUBCOMMITTEE AUTHORIZED THIS PARTICULAR HEARING

Petitioner cannot claim that the government did not prove that the Subcommittee had voted to authorize this particular hearing. First, petitioner did not raise this issue before the Subcommittee. Since it is an issue involving the internal procedures of the Subcommittee, it cannot be raised at petitioner's trial for the first time. If petitioner had raised it before the Subcommittee, it could easily have been remedied by having the Subcommittee authorize the hearing. Second, petitioner cannot raise the issue in this Court since he did not raise it in the district court or in the court of appeals. It is well established that this Court will not notice errors which have not been raised below unless they are obvious. *E.g., United States* v. *Atkinson,* 297 U.S. 157, 159–160; *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 239; *Johnson* v. *United States,* 318 U.S. 189, 200. Moreover, this Court has held that an issue involving questions of fact cannot be raised for the first time on appeal since such a procedure deprives the other party of the opportunity to introduce evidence on the issue. *United States* v. *Di Re,* 332 U.S. 581, 588;

Giordenello v. *United States*, 357 U.S. 480, 487–488. This principle is applicable here since the government is entitled to have the opportunity to introduce evidence directly on this issue.

In any event, we submit that the record shows that the Subcommittee authorized the hearings. Under Rule 1 of the Subcommittee's rules, a major investigation must be voted by a majority of the Subcommittee's members. Since seven of the nine members were present at the start of this hearing (Gov. Ex. 8, p. 1587), and none objected to it, they implicitly considered the investigation as approved. While petitioner states (Pet. Br. 48 and 49, note 26) that Senator Hennings said that the hearing was not authorized, and cites the Hearings, Part 17, p. 1588, the reference does not support his contention. The transcript of the hearing shows that Senator Hennings was concerned with an entirely different problem—whether the Subcommittee was investigating Communist infiltration of the press or the press itself. Senator Hennings claimed that the latter was the correct purpose of the investigation, and the Chairman agreed (see *supra*, pp. 5–6).

In addition, the Subcommittee counsel testified at petitioner's trial that the Subcommittee did not consider that it was initiating a major investigation (J.A. 37; Tr. 183–184), which, under its rules, would require approval of the Subcommittee. He explained that the basic investigation, which had been initiated long before, was into "the strategy and tactics of world Communism" and this investigation into Communist activities in news media was merely "an offshoot and a portion" (J.A. 37). Thus, under the Subcom-

mittee's own interpretation of its rules—which, unless clearly inconsistent with the language of the rules, is conclusive—no new approval of these hearings was necessary.

II

THE SUBCOMMITTEE'S INVESTIGATION DID NOT VIOLATE THE FIRST AMENDMENT

Petitioner and the *Amicus Curiae* (the New York Civil Liberties Union) claim (Pet. Br. 52–58; *Amicus* Br. 14–21) that the Subcommittee's investigation violated his rights under the First Amendment. As we have demonstrated, however, in our brief in *Shelton* v. *United States*, No. 9, this Term, pp. 48–50, which involved the same investigation and hearings, petitioner's contention is without merit. See also *Barenblatt* v. *United States*, *supra*, 360 U.S. at 125–134.

Petitioner attempts (Pet. Br. 53, 54) to distinguish *Barenblatt* on the ground that he and his associates engaged in "lawful political activity, entirely unconnected with overthrow of the government." Even if we assume this is true—and petitioner's refusal to answer may well have foreclosed questions which would have shown the contrary[1]—the Subcommittee was clearly entitled to ask the questions and require petitioner to answer. This Court, in *Barenblatt*, rejected a similar claim on the ground that there is a "close nexus between the Communist Party and vio-

[1] Petitioner offered to prove at his trial that he himself had not engaged in illegal activities (J.A. 46–48), but he could not possibly know of all the activities of his associates.

lent overthrow of government" and therefore upheld an investigation "into the extent to which the Communist Party has succeeded in infiltrating into our universities, or elsewhere, persons and groups committed to furthering the objective of overthrow" (360 U.S. at 128–129). The Court held that a Congressional committee could properly "inquire into the various manifestations of the Party's tenets. The strict requirements of a prosecution under the Smith Act * * * are not the measure of the permissible scope of a congressional investigation into 'overthrow', for of necessity the investigatory process must proceed step by step." 360 U.S. at 130. Similarly, in *Wilkinson* v. *United States*, 365 U.S. 399, 414, the Court said:

> [W]e cannot say that, simply because the petitioner at the moment may have been engaged in lawful conduct, his Communist activities in connection therewith could not be investigated. * * * As the *Barenblatt* opinion makes clear, it is the nature of the Communist activity involved, whether the momentary conduct is legitimate or illegitimate politically, that establishes the Government's overbalancing interest. * * *
>
> The subcommittee's legitimate legislative interest was not the activity in which the petitioner might have happened at the time to be engaged, but in the manipulation and infiltration of activities and organizations by persons advocating overthrow of the Government.

And in *Braden* v. *United States*, 365 U.S. 431, 435, the Court again stated:

> *Barenblatt* did not confine congressional committee investigation to overt criminal activity * * *. Information as to the extent to which the Communist Party was utilizing legitimate organizations and causes in its propaganda efforts in [the South] was surely not constitutionally beyond the reach of the subcommittee's inquiry.

Petitioner also attempts to distinguish *Barenblatt* on the ground that petitioner "discussed fully his own membership in the Communist Party and refused only to give information which would reveal the identity of his associates" (Pet. Br. 53; see the *Amicus* Br. 14–21). He reasons that the public interest underlying the Subcommittee's questions—the legislative value of the identity of petitioner's associates—was never shown and that petitioner's private interest—the non-disclosure of his associates—is the most compelling possible private interest. Thus, he concludes that "balancing * * * the competing private and public interests at stake in the particular circumstances" of this case (*Barenblatt, supra,* 360 U.S. at 126), results, unlike in *Barenblatt,* in giving the witness immunity from answering the Subcommittee's questions.

We submit that this contention, even if it were correct, is not sufficient to reverse petitioner's conviction. As we have indicated above (pp. 18–19), one of the questions petitioner refused to answer related directly to his own Party activities—whether the book for which he did research was published by a Communist publishing house (count 10)—and eight others, while relating to the activities of other persons, did not require

the disclosure of their identity. In any event, as we will now show, petitioner's contention with regard to the seven questions which sought the names of other persons is without merit.

A. PETITIONER CANNOT RAISE THE FIRST AMENDMENT RIGHTS OF OTHER PERSONS

Petitioner admitted that he was a member of the Communist Party, but refused to answer, *inter alia*, questions concerning the identity of others. These questions did not interfere with his own rights of speech and association as protected by the First Amendment since any interference with those rights[4] had already occurred when he testified as to his own activities. While conceivably he might be reluctant to associate with others if he knew that he would have to divulge their names to a Congressional committee, the reason for this reluctance was his own moral scruple against testifying about other persons. But "moral scruples," if not based on some valid legal ground, are not legal justification for refusing to answer. Insofar as inquiry by the Subcommittee might inhibit petitioner's own speech or association, it is entirely as a result of petitioner's moral beliefs which are not protected by the First Amendment. Insofar as the questions asked petitioner might involve rights which are protected by the First Amendment, they would be the rights of association and speech of other persons who conceivably might be inhibited by the knowledge that their identity could

[4] We do not concede that there was any invalid interference with such rights (see *supra*, pp. 25-27).

be revealed by colleagues to an investigating committee.

It is well settled that, in the absence of exceptional circumstances, a litigant can raise only his own constitutional rights. For example, a defendant cannot complain of an illegal search and seizure under the Fourth Amendment unless he himself was injured by it. *Jones* v. *United States,* 362 U.S. 257, 260–267.* Similarly, the Fifth Amendment privilege against self-incrimination is exclusively personal. See *Hale* v. *Henkel,* 201 U.S. 43; *Rogers* v. *United States,* 340 U.S. 367. In *Tileston* v. *Ullman,* 318 U.S. 44, the Court unanimously dismissed an appeal by a physician from a decision of a state court upholding the constitutionality of a statute prohibiting the use of drugs or instruments to prevent conception and the giving of assistance in their use (*id.* at 46):

> We are of the opinion that the proceedings in the state courts present no constitutional question which appellant has standing to assert. The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life—obviously not appellant's but his patients'. There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf. *Cronin*

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* *Jones* held that a person legitimately on the premises at the time of the allegedly illegal search and seizure is sufficiently injured to claim the Fourth Amendment even though he was only a "guest" or "invitee."

v. *Adams*, 192 U.S. 108, 114; *Standard Stock Food Co.* v. *Wright*, 225 U.S. 540; *Bosley* v. *McLaughlin*, 236 U.S. 385, 395; *Blair* v. *United States*, 250 U.S. 273; *The Winnebago*, 205 U.S. 354, 360; *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U.S. 207, 220.

The only significant exception to the rule that a litigant can raise only his own constitutional rights against allegedly invalid governmental action is when the litigant can properly be said to represent the persons whose constitutional rights were allegedly violated, and, in addition, the litigant himself was seriously injured. In *Pierce* v. *Society of Sisters*, 268 U.S. 510, the state had passed a law requiring parents to send their children to public schools. The Court allowed two corporations to invoke the Fourteenth Amendment rights of patrons of their schools in order to protect their own business and property from destruction by unconstitutional governmental action taken against their patrons. *Id.* at 535. In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, the Court considered a claim that plaintiff organizations were deprived of due process by the action of the Attorney General in labelling them as "Communist" without notice or hearing. The resulting lists were turned over to the Loyalty Review Board for use in connection with determinations of disloyalty of government employees. In these circumstances, two concurring opinions indicated that an organization could raise the constitutional rights of its members. Mr. Justice Frankfurter stated (*id.* at 159):

> The threat which it carries for those members who are, or propose to become, federal employees makes it not a finicky or tenuous claim to object to the interference with their opportunities to retain or secure such employment as members. The membership relation is as substantial as that protected in *Truax* v. *Raich* [10] and *Pierce* v. *Society of Sisters* * * *.

And Mr. Justice Jackson similarly stated (*id.* at 187):

> [T]he Government has lumped all the members' interests in the organization so that condemnation of the one will reach all. The Government proceeds on the basis that each of these associations is so identical with its members that the subversive purpose and intents of the one may be attributed to and made conclusive upon the other. Having adopted this procedure in the Executive Department, I think the Government can hardly ask the Judicial Department to deny the standing of the organizations to vindicate its members' rights.

In *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 458–460, the Court adopted the reasoning of the two concurring

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[10] In *Truax* v. *Raich*, 239 U.S. 33, a state statute prohibited businesses from employing more than twenty percent aliens. The Court upheld the right of an alien-employee to enjoin officers of the state from enforcing the statute even though the statute penalized only employers. The issue was of the kind, not involved in the instant case, as to whether the litigant was sufficiently affected by the statute to challenge it, and the Court held that the alien was directly affected. There was no question whether the alien could raise the constitutional rights of another person since the right to work and earn a livelihood, which was the constitutional right invoked, was the alien's own right, not the employer's.

opinions in *Joint Anti-Fascist* in holding unconstitutional the state's attempt to compel the Association to disclose its membership list. The Court repeated its settled rule embodied in *Tileston* v. *Ullman, supra,* and then held that this rule was not violated by allowing an association to assert the constitutional rights of its own members to freedom of association (357 U.S. at 459–460):

> Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical. The Association * * * is but the medium through which its individual members seek to make more effective the expression of their own views. The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely affected if production is compelled is a further factor pointing toward our holding that petitioner has standing to complain of the production order on behalf of its members. Cf. *Pierce* v. *Society of Sisters,* * * *.

Similarly, in *Bates* v. *Little Rock,* 361 U.S. 516, the Court allowed officials of the N.A.A.C.P. to assert the constitutional rights of its members in upholding the claim that compulsory disclosure of the N.A.A.C.P.'s membership lists would violate their freedom of association. In *Uphaus* v. *Wyman,* 360 U.S. 72, the Court was faced with the analogous problem whether the director of a summer camp could assert the constitutional rights of his guests in refusing to comply with a state order to produce the names of the guests. The Court, however, refused to decide this

issue (*id.* at 77–78) and held that Uphaus' claims, assuming he had standing to raise them, were invalid on their merits.

We submit that petitioner's assertion of the rights of the unknown other persons goes far beyond the circumstances of *Pierce*, *Joint Anti-Fascist*, *N.A.A.C.P.*, *Bates*, and *Uphaus*. In *Joint Anti-Fascist* and *N.A.A.C.P.*, organizations were asserting the rights of their own members on matters of common concern. In *Bates*, officers of the organization asserted the rights of the organization's members on matters of common concern. In *Pierce*, while the individuals whose rights were claimed did not actually belong to the organizations which brought the action, nevertheless the organizations and the individuals (schools and their patrons) were integrally related, especially with regard to the impact of the particular statute and constitutional right involved in the case. Moreover, the organizations were threatened with direct and severe harm, indeed destruction, if the statute were enforced. Similarly, in *Uphaus*, while the individuals involved were, strictly speaking, guests and not members of an organization, they too were integrally related to the organization. And Uphaus, as the executive director of the organization, was asserting the right of the organization to represent its guests in a matter of common concern. In contrast, in the instant case, petitioner is, of course, not an organization to which the third persons belonged, or of which they were guests or patrons; nor is he an officer who can claim to represent such an organization. Petitioner's only connection with the unnamed third

persons is at most one of friendship and common membership, in the recent past, in the Communist Party. This is not a sufficiently close relationship to allow him to raise and vindicate their rights. If it were held to be adequate, deep inroads would be made in the settled principle that a litigant is limited to the prosecution of his own rights.

B. THE FIRST AMENDMENT IS NOT VIOLATED BY QUESTIONS ASKING THE IDENTITY OF OTHER PERSONS

Even if the Court were to consider the First Amendment rights of other persons, the Court should hold that such rights were not violated.

When it subpoenaed and sought to question petitioner, the Subcommittee had under inquiry the subject of Communist activities in news media (see *infra*, pp. 40–41, 43–46). Any question whether Congress has the power to investigate Communist activity in this field has been determined by this Court's holding in *Barenblatt* v. *United States*, *supra*. There, the Court first stated generally that "Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof" (360 U.S. at 127), and that "[j]ustification for its exercise in turn rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence" (*id.* at 128). The Court concluded that "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and * * * therefore the provisions of the First Amendment have not been offended" (360 U.S. at 134).

The government interest at stake in inquiring about other persons involved in Communist activities is at least as strong as those in *Barenblatt* concerning the Communist activities of the witness himself. It is just as important to a Congressional committee to ascertain the Communist activities of other persons as of the witness. Indeed, it may be more valuable since the committee is required to have some information concerning the witness in order to subpoena him. The Court has indicated that a Congressional committee can subpoena a witness only if it has probable cause to believe that he has some information of use to it (see our brief in *Shelton, supra,* pp. 50–55). In contrast, the committee presumably does not know the identity of the other persons. And if it determines their identity, the committee can question them in order to determine their own Communist activities and knowledge of Communist activities generally.

On the other hand, the individual interests here are, at best, no greater than in *Barenblatt,* and are probably weaker. If petitioner has standing to assert the First Amendment rights of other persons (but see *supra,* pp. 28–34), his individual interest in this assertion is substantially less than the interest Barenblatt had in claiming his own First Amendment rights.

Petitioner has chosen to protect what he believes to be the First Amendment rights of other persons who have apparently no more intimate connection with himself than friendship. Barenblatt, in contrast, had the direct interest of protecting his own privacy of belief, association, and activity. Thus insofar as petitioner is concerned, there is even more reason in the circumstances of this case than in *Barenblatt* to strike

the balance in favor of the governmental, rather than individual, interest. And insofar as the case is viewed from the standpoint of the other persons, their interest in preventing disclosure through third parties (such as petitioner) of their beliefs and activities is less than their interest in not being compelled themselves to testify as to those matters. But *Barenblatt* holds that if these other persons were themselves called before the Subcommittee, they would have to answer such questions as to their own conduct. At the very most, petitioner, in claiming the rights of these others, stands in the same position as if they were claiming their rights for themselves—that is, the same position as Barenblatt was in. Therefore, this Court's decision in *Barenblatt* is, we believe, inescapably controlling.

Moreover, the issue as to three of the counts is substantially controlled by *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1. There, this Court held constitutional a provision of the Internal Security Act of 1950 requiring the registration and filing of membership lists by organizations claimed to be substantially controlled by the foreign powers controlling the world Communist movement, and which operate primarily to advance the objectives of that movement: the overthrow of existing government by any means necessary and the establishment in its place of a Communist totalitarian dictatorship. The Court found that the danger to the national security from such organizations justified the Congress in requiring disclosure of their members, unlike the situation in *N.A.A.C.P.* v. *Alabama, supra*, *Bates* v. *Little Rock, supra*, and *Shelton* v. *Tucker*, 364 U.S. 479,

where, the Court said, the state had shown no substantial interest in the disclosure of the organization's members (367 U.S. 88–105). The Court further held that the evidence before the Subversive Activities Control Board sustained the Board's determination that the Communist Party was required to register under the Act (*id.* at 69).

This Court has indicated that the power of Congress to investigate is broader than the area within which it can constitutionally legislate. *Barenblatt* v. *United States, supra,* 360 U.S. at 130; *Wilkinson* v. *United States,* 365, U.S. 399, 414–415. The questions involved in counts 1, 2, and 6—who were the members of a Communist Party cell in New York City, of a Party cell in Buffalo, and of a Party cell on the New York Herald Tribune, to which cells petitioner admitted he belonged—are obviously far less broad than the requirement of the Internal Security Act that all Party members must register. Since Congress can, consistent with the First Amendment, pass legislation requiring the registration of all Party members, *a fortiori,* then, a Congressional committee, seeking information in order to legislate, can require a witness to disclose the names of members of Party units to which he belonged.

III

THE QUESTIONS PETITIONER REFUSED TO ANSWER WERE PERTINENT TO THE SUBJECT UNDER INQUIRY AND THIS PERTINENCY WAS MADE CLEAR TO PETITIONER BY THE SUBCOMMITTEE

Petitioner contends that the government failed to prove the subject under inquiry by the Subcommittee

or the pertinency of the subject to the subject under inquiry (Pet. Br. 20–42) and that the Subcommittee failed to apprise him of this pertinency when he appeared before it (Pet. Br. 42–46). Both contentions are without merit.

A. PETITIONER FAILED TO CHALLENGE THE PERTINENCY OF THE QUESTIONS WHEN HE APPEARED BEFORE THE SUBCOMMITTEE AND THEREFORE CANNOT CLAIM AT HIS TRIAL THAT HE WAS NOT APPRISED OF THEIR PERTINENCY. IN ANY EVENT, HE WAS APPRISED OF THEIR PERTINENCY

1. As we have shown in our brief in *Shelton* v. *United States, supra,* pp. 25–32, a witness before a Congressional committee cannot claim that the committee has failed to apprise him of the subject under inquiry and the pertinency of the questions to this subject, unless he raises the issue of pertinency before the committee itself. *Barenblatt* v. *United States, supra,* 360 U.S. at 123–124; *Deutch* v. *United States,* 367 U.S. 456, 469. He cannot wait until trial to raise an objection which the committee could easily remedy.

Before the Subcommittee, petitioner failed to object to the questions on the ground of pertinency. Except for stating that he did not want to inform on others, petitioner relied entirely on various objections based on the First Amendment (see *supra,* pp. 8–9). The only possible objection based on pertinency in his written statement, which was undoubtedly prepared with the aid of counsel, was (*id.* at p. 1733):

> I respectfully submit that my private affairs, beliefs, and associations are not proper subjects for investigation by this subcommittee. Their pertinence to any valid legislative in-

> quiry is in serious doubt since the first amendment to the constitution prohibits legislation affecting freedom of speech and assembly.

Similarly, petitioner, who was accompanied by counsel (Hearings, Part 17, p. 1728), orally stated at the hearing the substance of this part of his written statement as: "[M]y private affairs, my beliefs, my associations, are not I believe, proper subjects for investigation by this subcommittee and that their pertinence to any valid legislative purpose is in doubt" (*id.* at p. 1735). These objections plainly were that the investigation could not be pertinent to any legislative purpose valid under the First Amendment. They do not mean that the questions were not pertinent to the subject in fact under inquiry. Moreover, even if petitioner meant to object to the pertinency of the questions to the subject under inquiry, he did not say that he was refusing to answer because he believed the questions were not pertinent. Instead, he said merely that their pertinence was in doubt.

Even if petitioner's objection was intended to question the pertinency of the questions to the subject under inquiry, this Court held in *Barenblatt* that the issue of pertinency is not properly raised by statements of a witness which "constituted but a contemplated objection to questions still unasked, and buried as they were in the context of [the witness'] general challenge to the power of the Subcommittee * * *" (360 U.S. at 124). Similarly in *Deutch*, the Court held that the issue of pertinency was not raised by indications of "doubt as to the importance of the questions, [since] the petitioner's main concern was clearly his own conscientious unwillingness to act as an informer" (367 U.S.

at 469). These statements apply equally here. The written and oral statements of petitioner's objections were made prior to any of the questions which were the subject of the indictment and when petitioner subsequently refused to answer he merely referred to his earlier statement. Petitioner's objection expresses at most only doubt as to pertinency. And petitioner's unwillingness to answer was clearly based on his claim that the Subcommittee lacked the constitutional power to conduct this investigation and on his desire to avoid being an informer.

2. In any event, petitioner was apprised of the subject under inquiry. Petitioner admits (Pet. Br. 43) that he was present at the start of the hearing on January 6, 1956, a few minutes before he testified (he was the second witness on that day). At that time the Chairman of the Subcommittee stated that the hearings were directed to investigating infiltration of persons identified as Communists into news agencies (Gov. Ex. 8, pp. 1717–1718). Senator Hennings said (*id.* at p. 1718):

> I think that no one will quarrel with nor take issue with the fact that this committee has the right to inquire into all efforts or, indeed, all consummations of efforts of the Communist Party to infiltrate *newspapers or other media of communication*. [Emphasis added.]

And petitioner's prepared statement, on which he relied at the hearings as stating his reason for refusing to answer the questions underlying his conviction, demonstrates clearly that he knew that the Subcommittee's investigation was into Communist activities

in news media. The statement is largely devoted to the claim that the Subcommittee's investigation of the newspaper field violated the freedom of the press guaranteed by the First Amendment (*id.* at pp. 1733–1734). On the basis of similar objections, this Court held in *Barenblatt* that "[i]n light of [the witness'] proposed memorandum of constitutional objections there can be no doubt that this petitioner was well aware of the Subcommittee's authority and purpose to question him as it did" (360 U.S. at 124).

Of the questions petitioner refused to answer, at least four were pertinent on their face to the subject of Communist activities in news media: who were the members of the cell on the Herald Tribune (count 6); whether any members of that cell were still employed by the Herald Tribune (count 7); whether a book on which petitioner had admittedly done research was published by a Communist publishing house (count 10);[11] and whether the person for whom

[11] Petitioner contends (Pet. Br. 39) that count 10 is invalid because the question on which it is based was vague. Petitioner, however, did not object on this basis before the Subcommittee and therefore cannot raise the issue now (see our brief in *Shelton*, *supra*, pp. 25–29). If petitioner had claimed before the Subcommittee that he did not understand the question, the Subcommittee could easily have made it more clear.

In any event, we believe that the question was sufficiently clear for a Congressional committee to require a witness to answer. It was asked following a series of questions relating to Communist Party cells and to the National Committee for Peoples' Rights, which the Subcommittee told petitioner had been cited by the Attorney General as the equivalent of the "legal arm of the Communist Party" (Gov. Ex. 8, p. 1743). In this context, the phrase "Communist publishing house" surely meant, not merely a publisher of Communist writings, but one which was controlled and run by Party members.

petitioner had done the research was known to petitioner to be a Communist (count 11).

In addition, petitioner refused to answer whether any persons connected with Veterans of Democracy were known by him to be Communist or to name the officer of that organization for whom he had worked (counts 16 and 17) (see *supra*, pp. 11-12). Petitioner had previously admitted working for that organization, in part as a researcher for one of its officers who spoke weekly over a radio station. Thus, the pertinence of these questions to Communist activities in mass media was likewise clear.

The question involved in count 8—whether petitioner told anyone when he quit the Communist Party—was likewise plainly pertinent. The question whether a witness is a member of the Communist Party is on its face, as the Court held in *Barenblatt*, 360 U.S. at 125, pertinent to an investigation of any aspect of Communist activities. Here, after petitioner testified that he left the Communist Party in 1948 (Gov. Ex. 8, p. 1744), he was asked what he did to evidence his withdrawal (*id.* at p. 1745). He answered that he stopped going to meetings and paying dues. The Subcommittee asked whether petitioner had written a resignation or told anyone, and he answered that he had not written a resignation. Petitioner was then asked whether he had told anyone and he invoked the husband-wife privilege.[11] The

[11] Petitioner contends (Pet. Br. 40) that the Subcommittee was required to accept this objection. Petitioner's claim of privilege was improper, however, since the Subcommittee's question did not seek to elicit the substance of petitioner's com-

Subcommittee directed him to answer and he refused. Clearly, this series of questions was, as the district court held (J.A. 37–38), an attempt to ascertain whether petitioner had actually left the Party, an issue which was clearly pertinent to the subject under inquiry.

B. THE GOVERNMENT PROVED THAT THE QUESTIONS WERE PERTINENT TO THE SUBJECT UNDER INQUIRY

1. We have shown that petitioner was apprised that the subject under inquiry was Communist activities in news media. We have also pointed out that seven of the questions on the basis of which he was convicted were clearly pertinent to this subject. Since the government introduced the transcript of the hearings at petitioner's trial, it amply proved that these questions were in fact pertinent to the subject under inquiry.

Moreover, other evidence introduced by the government at petitioner's trial showed that the subject under inquiry when petitioner testified was Communist activities in news media. The transcript of the hearings (Gov. Ex. 8) showed that, at the start of the hearings on January 4, the Chairman of the Subcommittee indicated that the purpose of the hearings was to investigate this subject. Senator

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munication, but only the identity of any person whom he had told of his resignation from the Party.

Petitioner also contends (Pet. Br. 39–40) that he answered this question by invoking the husband-wife privilege. Petitioner, however, explicitly refused to answer the question (Gov. Ex. 8, p. 1745). His reliance on the privilege in refusing to answer does not constitute a sworn answer on which the Subcommittee could rely, even though its next question assumed that petitioner may have told his wife.

Hennings reiterated that "the Committee is interested in the extent and nature of so-called Communist infiltration if such exists, into any news-dispensing agency" and the investigation was "an effort on the part of this committee to show such participation and such attempt as may be disclosed on the part of the Communist Party in the United States or elsewhere, indeed, to influence or to subvert the American press" [11] (see *supra*, pp. 5–6). All the eighteen witnesses who testified at the hearings on January 4, 5, and 6, 1956, worked in the communications field. And the Subcommittee counsel testified at petitioner's trial that the Subcommittee was investigating "within the broad area of [Communist] tactics and strategy, within the narrower area of infiltration of mass communications" (see *supra*, p. 7).

2. Petitioner contends (Pet. Br. 24–26) that the subject under inquiry, despite "some evidence to that effect" (Pet. Br. 25), was not Communist activities in news media. This contention rests upon statements made by the Subcommittee counsel both at the hearings and petitioner's trial, by the Assistant United States Attorney at the trial, and by the district court. Since virtually the same contentions are made in *Price* v. *United States*, No. 12, this Term, which involved the same hearings, we respectfully refer the Court to our brief in that case (pp. 29–31). There we demonstrate that these statements do not prove that the Subcommittee was investigating only Com-

[11] Petitioner was apparently not present when these statements were made and therefore we do not rely on them to show that he was apprised of the subject under inquiry.

munist activities generally, since that general subject is perfectly consistent with the particularized subject of Communist activities in news media. But even if petitioner were correct that the subject under inquiry was Communist activities generally, this is a proper subject within the authority of the Subcommittee. See our brief in *Liveright, supra,* pp. 42–44. All questions which petitioner refused to answer which were pertinent to Communist activity in news media are *a fortiori* pertinent to the broader subject; indeed, the other nine questions were also pertinent, either on their face or as shown by the government's evidence at the trial, to the subject of Communist activities generally (see *supra,* pp. 18–20, 10–11).

Petitioner notes (Pet. Br. 26–27) that the Assistant United States Attorney said in his opening statement at the trial that the Subcommittee was conducting "a very broad investigation, generally speaking, of the internal security and the national security of the United States" (Tr. 6). He reasons that this statement is, like a bill of particulars, binding on the government. First, however, it seems clear from the context of the statement itself that the Assistant United States Attorney was merely describing the authority of the Subcommittee and the totality of the Subcommittee's investigations, instead of these particular hearings. Second, even if this is not correct, the subject of Communist activities in news media is perfectly consistent with the broader subject of internal security generally (just as it is consistent, as we noted above, with the subject of Communist

activity generally). There is nothing in the Assistant United States Attorney's statement suggesting that the broad subject was the only one under inquiry and that the Subcommittee was not concentrating on a narrower area within the broader subject.

Third, even if the Assistant United States Attorney meant that no particularised subject was under inquiry and even if his opening statement is as binding as a bill of particulars, we have shown in our brief in *Shelton* v. *United States*, *supra*, pp. 38–41, that the government can, unless the defendant is prejudiced, amend the bill of particulars either formally by motion or in effect by introducing evidence conflicting with the bill. Here, petitioner was not surprised or otherwise prejudiced by any inconsistency between the opening statement and the evidence introduced by the government showing that Communist activity in news media was the particular subject under inquiry. Petitioner came to the trial prepared to rebut the government's evidence that the Subcommittee was investigating Communist activity in news media since this subject was expressly stated at the hearings themselves, as petitioner clearly understood. He objected both at the hearings (see *supra*, p. 8) and at his trial (J.A. 52, 56; Tr. 211–215) that the Subcommittee's investigation infringed on freedom of the press. And if petitioner had been surprised by the evidence introduced by the government at his trial, he should have moved for a continuance to allow him to prepare his defense. See *United States* v. *Neff*, 212 F. 2d 297 (C.A. 3).

3. Petitioner contends that, assuming *arguendo* the subject under inquiry to have been Communist activities in news media, nevertheless the questions were not pertinent to the subject. First, he says, the questions as to "[t]he identity of individuals engaged in lawful associational and political activities * * * is not 'clearly pertinent'" (Pet. Br. 35). Most of the questions, however, did not seek the identity of other persons (see *supra*, pp. 18–20). As to those that did, we show below that the identity of the people who engage in Communist activities is plainly part of an investigation into those activities (see *infra*, pp. 48–50). This Court upheld the pertinency of questions concerning lawful activities in *Barenblatt, Wilkinson* v. *United States*, 365 U.S. 399, and *Braden* v. *United States*, 365 U.S. 431, on the ground that they were clearly pertinent to an investigation of an aspect of Communist activity. 360 U.S. at 114–125; 365 U.S. at 414–415; 365 U.S. at 433. And in those three cases the Court also upheld the constitutionality under the First Amendment of investigations of lawful Communist activities because of their close connection with the illegal aims and methods of the Party (see *supra*, pp. 25–27).

Second, petitioner contends (Pet. Br. 33–38) that the questions were not pertinent because they related to events which were too remote in time. But in order to determine, and particularly to understand, the present and future activities of the Communist Party, the Subcommittee must of necessity inquire a considerable distance into the past. The questions petitioner refused to answer concerned Communist activities from 1935 up to the time of the inquiry

in 1956. At the very least, the questions in count 6, which related to petitioner's associates in a Party cell in the New York Herald Tribune between 1943 and 1951, count 7, as to whether any members of that cell were still employed by the Herald Tribune in 1956, and count 8, concerning whether he told anyone when he left the Party in 1948, were plainly not remote.[14] In *Barenblatt*, this Court held (360 U.S. at 125) that the "pertinency" of "questions as to [the witness'] own Communist Party affiliations," including membership in a Communist Club between 1947 and 1950 (*id.* at 114), "was clear beyond doubt" to an investigation of Communist activities in education conducted in 1954.

The *amicus curiae* argues (*Amicus* Br. 11–14) that the questions were not pertinent since they sought the names of other persons. First, we repeat that answers to most of the questions would not have required petitioner to disclose the names of other persons (see *supra*, pp. 18–20). In any event, the disclosure of other persons engaged in Communist activities is, and was in this case, pertinent to the subject under inquiry for at least two legitimate purposes: first, to obtain information concerning the number and importance of persons engaged in the Communist activity under inquiry; and, second, to discover new witnesses who might have information concerning Communist activity not known to the witness or the committee.

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[14] As stated above (p. 20), petitioner's conviction must be sustained as long as any one of the counts is upheld.

We know of no judicial decision holding that personnel is not pertinent to the subject of Communist activity. On the contrary, the Court of Appeals for the District of Columbia Circuit has explicitly held in *Barsky* v. *United States*, 167 F. 2d 241, 246 (C.A. D.C.), certiorari denied, 334 U.S. 843:

> If Congress has power to inquire into the subjects of Communism and the Communist Party, it has power to identify the individuals who believe in Communism and those who belong to the party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. Personnel is part of the subject.

Accord, *Morford* v. *United States*, 176 F. 2d 54, 57 (C.A. D.C.), reversed on other grounds, 339 U.S. 258. Similarly, in *McPhaul* v. *United States*, 364 U.S. 372, 381, this Court recently held, with regard to the pertinency of records subpoenaed from the Civil Rights Congress:

> It would seem clear enough that the auspices under which the Civil Rights Congress was organized, the *identity and extent of its affiliations, the source of its funds and to whom distributed* would be prime considerations in determining whether the organization was being used by the Communists in the Detroit area. If the Civil Rights Congress was affiliated with known Communist organizations, or if its funds were received from such organizations or were used to support Communist activities in the Detroit area, those facts, it is reasonable to suppose, would be shown by the records called for by the subpoena, and those facts would be

> highly pertinent to the Subcommittee's inquiry [into Communist activity in the Detroit area]. [Emphasis added.]

Cf. *United States* v. *Bryan*, 339 U.S. 323; *United States* v. *Fleischman*, 339 U.S. 349. In short, both logically and by judicial precedent, the disclosure of names of other persons engaged in the Communist activity under scrutiny is just as pertinent to an investigation of an aspect of Communist activity as is the disclosure whether the witness himself is a Party member.

IV

THE SUBCOMMITTEE WAS NOT REQUIRED TO APPRISE PETITIONER OF THE SOURCE OF ITS AUTHORITY

Petitioner contends (Pet. Br. 50–52) that the Subcommittee failed to apprise him of the source of its authority from the Senate. This contention is unsound for three reasons.

First, petitioner did not even suggest this objection when he appeared before the Subcommittee. While he claimed that the Subcommittee had no constitutional power to question him since the inquiry violated the First Amendment, he did not contest that the Senate had purported to give the Subcommittee authority to investigate Communist activities (see *supra*, pp. 8–9). We have shown in our brief in *Shelton* v. *United States*, *supra*, pp. 26–29, that, unless a witness objects before the committee to the pertinency of the questions, he cannot claim at his trial that the committee failed to apprise him of this pertinency. By the same reasoning, petitioner cannot claim that the Subcommittee failed to apprise him of some of its

authority, when he did not claim before the Subcommittee that the Senate had not authorized the investigation. If petitioner had objected, the Subcommittee could easily have apprised the witness of the source of its authority, just as it could have specifically explained the pertinency of the questions.

Second, while petitioner claimed below that Senate Resolution 366 did not authorize this inquiry, he did not raise the distinct issue whether the Subcommittee told him that its authority was based on this resolution. Petitioner cannot raise the latter issue in this Court for the first time (see *supra*, p. 23).

In any event, *Watkins* v. *United States*, 354 U.S. 178, and *Barenblatt* require only that Congressional committees apprise witnesses, upon proper objection, of the subject under inquiry and the pertinency of the questions. In *Watkins*, the Court did state that the witness has the right to be informed of the "standard of criminality before the commission of the alleged offense" and "[p]art of the standard of criminality * * * is the pertinency of the questions * * *" (354 U.S. at 208). Similarly, it is possible to argue that the Senate's authorizing resolution is part of the standard of criminality. But there was no need for the Subcommittee to apprise petitioner of the source of its authority since the authority of the Committee is contained in the authorizing resolutions (S. Res. 366, 81st Cong., 2d Sess.; S. Res. 174, 84th Cong., 2d Sess.), which are public documents that are readily available. In contrast, the subject under inquiry and therefore the pertinency of the questions can only be obtained from the committee itself.

V

THE INDICTMENT WAS NOT REQUIRED TO SPECIFY THE SUBJECT UNDER INQUIRY OR THE PERTINENCY OF THE QUESTIONS TO THIS SUBJECT, OR TO STATE THE DELEGATION OF AUTHORITY FROM THE PARENT COMMITTEE TO THE SUBCOMMITTEE

The indictment upon which petitioner was convicted alleged that hearings were being conducted "pursuant to * * * Senate Resolutions 366 of the 81st Congress and 58 of the 84th Congress" and that the questions "were pertinent to the question then under inquiry" (J.A. 4). Petitioner claims (Pet. Br. 58–65) that the indictment was invalid because it failed (1) to specify the subject under inquiry when petitioner testified, (2) to specify the pertinency of the questions to this subject, and (3) to state the delegation of authority from the parent Judiciary Committee to the Subcommittee.

As we have shown in our brief in *Shelton* v. *United States, supra,* pp. 78–83, petitioner's contention that the indictment was required to state the subject under inquiry is inconsistent with Rule 7(c) of the Federal Rules of Criminal Procedure and with decisions both of this Court and the courts of appeals. While petitioner suggests that he needed to know the exact subject under inquiry in order to prepare his defense as we have seen (pp. 40–41, 43–45), this was clearly shown by the transcript of the hearings which was available to him. Moreover, the fact that petitioner did not even attempt to secure this information by moving for a bill of particulars strongly indicates that he understood the subject under inquiry. Although it is true, as we show in our brief in *Shelton,* pp. 38–40, that the government is not

irrevocably bound in its proof at trial by the bill of particulars, the defendant is entitled to be protected from prejudice if the government introduces evidence conflicting with the bill. The trial court would not be required to allow the government to introduce the evidence and, if it did do so, it must allow the defendant a reasonable time to prepare his defense.

For the same reasons that the indictment is not required to specify the subject under inquiry, an indictment which states that the questions are pertinent to the subject under inquiry need not provide the specific reasoning underlying this allegation of pertinency. As we show in our brief in *Price* v. *United States,* No. 12, this Term, p. 34, the indictment properly alleged the authority of the Subcommittee.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court of appeals should be affirmed.

ARCHIBALD COX,
Solicitor General.
J. WALTER YEAGLEY,
Assistant Attorney General.
BRUCE J. TERRIS,
Assistant to the Solicitor General.
KEVIN T. MARONEY,
CAROL M. BRENNAN,
Attorneys.

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